

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

LOUIS FLORES,

Plaintiff,

-v-

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

17 Civ. 36 (JGK)

**DECLARATION OF DARIAN HODGE**

I, Darian Hodge, declare as follows:

1. I am a Freedom of Information Act (“FOIA”) point of contact in the United States Attorney’s Office for the Southern District of New York (“USAO-SDNY”).
2. My responsibilities include serving as the Freedom of Information Act/Privacy Act (“FOIA/PA”) contact for the Southern District of New York. In this capacity, I serve as a liaison to the FOIA/PA Staff for the Executive Office for United States Attorneys (“EOUSA”) in Washington, D.C, which processes and responds to FOIA/PA requests directed to the USAO-SDNY.
3. My duties include receiving and reviewing requests made pursuant to FOIA, 5 U.S.C. § 552, and/or the PA, 5 U.S.C. § 552a, for records maintained by or located in the USAO-SDNY. One of my primary duties is to conduct searches within the USAO-SDNY for records responsive to FOIA/PA requests. In this case, I conducted searches per standard EOUSA FOIA training and guidance protocols, and with the assistance and direction of other USAO-SDNY personnel.
4. The statements I make in this declaration are made based on my review of the available official files and records of the USAO-SDNY, my own personal knowledge, or by knowledge acquired by me through the performance of my official duties.
5. I am familiar with the procedures followed by the USAO-SDNY in conducting searches for records responsive to FOIA/PA requests.
6. I am familiar with the FOIA request submitted by Plaintiff in this action.

7. The Plaintiff, on or about April 25, 2016, via email, sent a FOIA request to the FOIA/Privacy Unit, Executive Office for United States Attorneys. On or about May 23, 2016, the USAO-SDNY received a request from EOUSA, FOIA/PA to search for public records responsive to the FOIA request submitted by Plaintiff in this action. In that request, Plaintiff requested the following:
  - a. All records and information pertaining to dates, times, hosts, locations, and other information pertaining to speeches made by U.S. Attorney Bharara since he commenced serving as U.S. Attorney for the Southern District of New York;
  - b. All records, *complete* recordings in any format whatsoever (either digital or physical), *complete* transcripts, and other information pertaining to the *complete* speeches made by U.S. Attorney Bharara, including any question and answer sessions, since he commenced serving as U.S. Attorney for the Southern District of New York;
  - c. All records and information pertaining to the costs of paid by the U.S. Attorney's Office for U.S. Attorney Bharara and his staff to travel to and attend the appearances made outside of Manhattan, where U.S. Attorney Bharara has delivered speeches, including, but limited to, air fare, ground transportation, hotel accommodations, meals, entertainment, *per diem* allowances, and all other costs incidental or associated with speeches made by U.S. Attorney Bharara; and
  - d. All records and information pertaining to the policies, procedures, customs, traditions, guidelines, or other instructions followed by staff of the U.S. Attorney's Office for the Southern District of New York to record in any format whatsoever (either digital or physical), transcribe, and/or preserve any recordings and/or transcriptions of the speeches made by U.S. Attorney Bharara since he commenced serving as U.S. Attorney for the Southern District of New York.
8. After receiving the request from EOUSA on or about May 23, 2016, I began searching for responsive records within the USAO-SDNY and notified the USAO-SDNY FOIA liaison regarding the request, since the request related to senior personnel. On the same day, the FOIA liaison asked me to work with the USAO-SDNY Chief of Staff, Press Office, and Administrative Officer. Also on the same day, EOUSA sent a standard acknowledgement letter to the requester as to expected search duration and possible fees.
9. On or about May 27th, 2016, I informed EOUSA that I had exhausted the first two hours of search time, which are conducted without any fee assessed to the requester. I estimated that 28 more hours of search time would be needed to search for records responsive to the Plaintiff's FOIA request. I sent a standard and required fee estimate to EOUSA, FOIA/PA who then reviewed the estimate and sent a fee request for \$1,120.00 on or about August 15, 2016 to the Plaintiff.

10. This request was closed out by EOUSA, FOIA/PA because Plaintiff had not responded to the fee request within the allotted 30-day time limit. A closing letter regarding the same was sent to the requester on or about November 14, 2016.
11. On December 12, 2016, EOUSA was informed by the Office of Information Policy that the request for a fee waiver, which the Plaintiff appealed under Appeal No. DOJ-AP-2016-004870 was remanded.
12. At some point after April 12, 2017, when a letter issued by EOUSA, FOIA/PA had granted the Plaintiff's request for a fee waiver, I resumed my search for records within the USAO-SDNY responsive to the Plaintiff's requests.
13. To locate records responsive to this request, I began searching for responsive records within the USAO-SDNY and notified the USAO-SDNY FOIA liaison once again regarding the request since senior personnel were specifically identified in the request. The USAO-SDNY FOIA liaison asked me to continue to work with USAO-SDNY Press Office and Administrative Officer. The USAO-SDNY Press Office maintained potentially responsive documents in connection with live press conferences and question and answer sessions conducted by U.S. Attorney Bharara. These live press conference videos and question and answer sessions are publicly posted on the USAO-SDNY's public website and/or YouTube page. The USAO-SDNY Press Office provided all materials in its possession responsive to Plaintiff's request including the physical demonstratives kept in the USAO-SDNY Press Office that were responsive to Plaintiff's request. To facilitate transfer of these demonstratives in a digital format, USAO-SDNY personnel photographed all such demonstratives for the purpose of releasing those photographed demonstratives to the Plaintiff.
14. In addition, Associate U.S. Attorney John McEnany, who is familiar with the electronic files maintained within the USAO-SDNY, advised me of search efforts that he undertook to locate records responsive to Plaintiff's request.
  - a. AUSA McEnany is the Government Ethics Advisor for the USAO-SDNY and is involved in vetting events where the U.S. Attorney is invited to speak in order to ensure compliance with applicable government ethics rules and other restrictions. AUSA McEnany keeps records related to this function in email and other electronic file formats within his own records at the USAO-SDNY. In this matter, AUSA McEnany conducted keyword searches and file name reviews to identify records from his electronic files, which are maintained in his email archives and in network folders at the USAO-SDNY, that were potentially responsive to Plaintiff's request.
  - b. AUSA McEnany also searched or caused to be searched the internal Department of Justice network, known as "USANet," in order to locate any policies, procedures, customs, traditions, guidelines, or other instructions relating to record retention by U.S. Attorneys that were responsive to Plaintiff's requests.

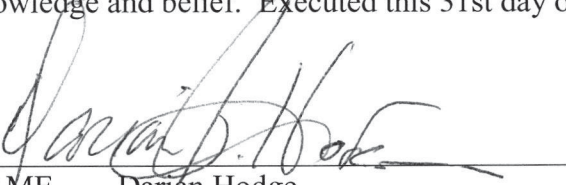
- c. AUSA McEnany also advised me that, as part of his role as the USAO-SDNY Government Ethics Advisor, he provides legal advice to the U.S. Attorney regarding invitations and requests to speak at and attend outside events, to ensure compliance with government ethics rules and other restrictions. As part of this process, AUSA McEnany sometimes consults with legal counsel at the EOUSA Office of General Counsel (“OGC”), who may then provide legal advice to AUSA McEnany regarding particular invitations and requests for the SDNY U.S. Attorney to speak at and attend outside events, to ensure compliance with government ethics rules and other restrictions.
15. Further, I have been advised that other USAO-SDNY personnel contacted EOUSA in order to locate any policies, procedures, customs, traditions, guidelines, or other instructions relating to record retention responsive to Plaintiff’s requests that were provided specifically to U.S. Attorney Bharara and that were responsive to Plaintiff’s requests.
16. I have also been advised that the U.S. Attorney’s administrative assistant undertook a search of network drives maintained at the USAO-SDNY specifically by or on behalf of U.S. Attorney Bharara during his time as U.S. Attorney, in order to locate additional responsive records relating to U.S. Attorney Bharara’s speeches, press conferences, testimony, and question and answer sessions. I have been advised that other USAO-SDNY personnel subsequently reviewed all potentially responsive records in order to identify, to a reasonable degree of certainty, final versions of the text of prepared remarks or testimony, or transcripts thereof, that U.S. Attorney Bharara gave, in order to release those records to the Plaintiff.
17. Finally, I have been advised that USAO-SDNY personnel in the USAO-SDNY budget department generated reports containing information responsive to the Plaintiff’s third request, namely, his request for records and information pertaining to the costs paid by the USAO-SDNY for U.S. Attorney Bharara and his staff to travel to and attend any appearance made outside Manhattan where U.S. Attorney Bharara made speeches or other remarks, for the purpose of providing those reports to the Plaintiff.
18. To my knowledge, and based also on information provided to me by USAO-SDNY personnel who assisted with and consulted on the searches conducted in this matter, there are no other locations in the USAO-SDNY where any other records might be located and responsive to the Plaintiff’s request. I am not aware of any other method or means by which a further search could be conducted and produce additional responsive records.
19. On April 27, 2017, I attempted to transmit the first interim release of records to the Plaintiff in a series of nine emails. I was advised that the Plaintiff responded that he had not received all of the emails, although USAO-SDNY email systems indicated that all of the emails had been transmitted successfully. Upon consultation with AUSA Rebecca S. Tinio, on April 28, 2017, I sent a DVD containing the first interim release of records to the Plaintiff by Federal Express, and transmitted the tracking information to the Plaintiff. Also on April 28, 2017, at the Plaintiff’s request, I resent all of the nine emails containing

the first interim release of records to another email address that the Plaintiff provided. Over the next several days, at the request of AUSA Tinio, I attempted to re-send some or all of the nine emails containing the first interim release of records to the Plaintiff. USAO-SDNY email systems indicated, throughout, that all of the emails had been transmitted successfully. Furthermore, Federal Express tracking information indicated that delivery of the DVD had been attempted several times to the Plaintiff, but was unsuccessful each time. Lastly, I was advised by AUSA Tinio that the Plaintiff requested that we provide the first interim release of records to him via online file transfer to a system known as “Google Drive”. I advised AUSA Tinio that USAO policy prohibited transferring files using that system. On May 9, 2017, at the request of AUSA Tinio, I sent another DVD containing the first interim release of records to the Plaintiff using the U.S. Postal Service.

20. On June 2, 2017, I sent the second interim release of records to the Plaintiff via certified mail on both a DVD and on a flash (or “thumb”) drive, in order to address concerns that the Plaintiff expressed about not being able to use the DVDs that we had previously sent to him. On June 2, 2017, I also emailed the certified mailing information to the Plaintiff. The second interim release of records included all of the records that comprised the first interim release, to ensure that the Plaintiff received all records.
21. On June 16, 2017, I sent the third and final release of records to the Plaintiff via certified mail. Because the third and final release included a number of large video files, the USAO-SDNY IT Division executed the file transfers to an external hard drive capable of storing such files. The third and final release of records included, among other things, all of the records that had previously been included in the second interim release to ensure that Plaintiff received all of the records. Also on June 16, 2017, I emailed the certified mail information to the Plaintiff. I have been advised by AUSA Tinio that USAO-SDNY personnel subsequently printed out hard copies of all of the records provided to the Plaintiff (except for the video files) at the Plaintiff’s request, and that the Plaintiff picked up those hard copy records from the USAO-SDNY.
22. During the course of my efforts to search for records responsive to the Plaintiff’s request, I created a draft tracking chart as directed by the USAO-SDNY FOIA liaison. Intended for internal use only, this chart tracked located records relating to different speeches, remarks, press conferences, and testimony given by then-U.S. Attorney Bharara. The draft chart contained information about the date of the speech, hyperlinks to, where available, documents relating to the speech (for example, the prepared text or transcript), and columns to indicate whether any corresponding demonstrative or video was located. The draft chart was, at all times, only an incomplete draft, never in final form, and never intended to be released to the Plaintiff. It was created after Plaintiff submitted his FOIA request, during the course of this litigation for internal use only to prevent duplication of effort and records. Furthermore, the existence of blank boxes within the columns and rows in the draft chart was not meant to indicate that a particular type of record did or did not exist corresponding to a particular speech – for example, the draft chart is not intended to signify that demonstratives or videos exist or do not exist corresponding to each speech or set of remarks given by U.S. Attorney Bharara. It is my belief, after

reviewing the electronic case file associated with this litigation, that this draft chart was likely and inadvertently included in a release of information to the Plaintiff. If the draft chart was indeed released to the Plaintiff, that release would have been in error.

I declare under the penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief. Executed this 31st day of January, 2018, New York, NY.



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NAME      Darian Hodge  
TITLE      FOIA Officer  
DISTRICT   Southern District of New York